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OPEN-ENDED WORKING GROUP ON THE QUESTION
OF EQUITABLE REPRESENTATION ON AND
INCREASE IN THE MEMBERSHIP OF THE
SECURITY COUNCIL AND OTHER MATTERS
RELATED TO THE SECURITY COUNCIL

STUDY ON THE LEGAL BASIS OF THE VETO

Letter dated 11 August 1997 from the Under-Secretary-General for General Assembly Affairs and Conference Services addressed to the Vice-Chairman of the Open-Ended Working Group

I refer to your request to the Secretariat for a study on the legal basis of the veto in your capacity as Vice-Chairman of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and other matters related to the Security Council.

When the Working Group endorsed the suggestion of the representative of Egypt for a "legal study to be undertaken by the Secretariat on the basis of the veto", at its 30th meeting, on 13 June 1997, Egypt also noted that the study should be expressed in a "short (1-2 pages) informal and neutral paper provided by the Secretariat".

Further, and as noted in your statement to the Working Group on 11 July 1997, the Office of Legal Affairs, which was to undertake the study, was overstretched and unable to produce the study at that time. However, I now have the honour to forward herewith the study prepared by the Office of Legal Affairs entitled "The legal basis of the veto".

(Signed) JIN Yongjian
Under-Secretary-General for General Assembly
Affairs and Conference Services

ANNEX

The legal basis of the veto

1. The right of each permanent member of the Security Council to veto non-procedural decisions of the Security Council is provided for in Article 27(3) of the Charter of the United Nations.

Questions subject to veto

2. During the San Francisco Conference, the four co-sponsors issued a Declaration concerning the voting procedure of the Council. Paragraphs 2 and 3 of part I of the Declaration indicate which decisions are procedural, while paragraphs 4 and 5 indicate those decisions which are subject to veto, i.e., those decisions that may "initiate a chain of events which might, in the end, require the Council under its responsibilities, to invoke measures of enforcement under [Chapter VIII]". Part II of the Declaration specifies how decisions are made as to whether questions before the Council are procedural or substantive (see para. 8 below).

3. The provisional rules of procedure of the Security Council contain no provisions as to voting, except for a cross-reference to the Charter (rule 40). The Official Records on the adoption of the provisional rules do not show any relevant discussion on the veto.

4. At its first and third sessions, the General Assembly adopted pleas addressed to the permanent Council members for restraint in the use of the veto (resolutions 40 (I) and 267 (III)). Annexed to the second resolution is a list of decisions deemed procedural. In the studies of Article 27 appearing in successive issues of the Repertory of Practice of United Nations Organs there are tables showing which questions have been held by the Council to be procedural or not to be procedural.

Effect of abstentions and absences

5. Early on the Council established a practice whereby an abstention by a permanent member on a non-procedural question would not constitute a veto. The first time this occurred was at the 39th meeting, on 29 April 1946, when the representative of the Union of Soviet Socialist Republics abstained, "bearing in mind ... that my voting against the resolution would make its adoption impossible". This practice has been repeatedly reaffirmed by presidential rulings, and each of the permanent members has repeatedly relied on it; the Repertory studies of Article 27 include a table listing these instances, and more detailed information is given in the Repertoire of the Practice of the Security Council.

6. In its advisory opinion on Namibia (South West Africa),[a] the International Court of Justice acknowledged this practice by stating that "This procedure followed by the Security Council ... has been generally accepted by Members of the United Nations and evidences a general practice of that Organization".

7. The same practice has been adopted in instances of absence of a permanent member from voting. For example, at its 473rd meeting, on 25 June 1950, the Security Council adopted, in the absence of a permanent member, a resolution to determine the armed invasion of the Republic of Korea "a breach of the peace" and to call for assistance from the Members of the United Nations.

The "double veto"

8. In accordance with Part II of the San Francisco Declaration, "the decision regarding the preliminary question as to whether or not such a matter is procedural must be taken by a vote of seven members of the Security Council, including the concurring votes of the permanent members". This provides for the practice known as the "double veto": a veto is first used to establish that a given question is non-procedural, and then on the vote on the question itself. (In practice, the vote on the question itself may precede the decision as to its non-procedural nature.) An example of the use of the "double veto" occurred during the 49th meeting of the Council, on 26 June 1946, when a permanent member objected to the President's interpretation of a vote as procedural, which resulted in a second vote on the procedural nature of the question.

Notes

[a] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16.